No. 14,500

United States Court of Appeals

For the Ninth Circuit

In the Matter of the Application of L. B. & W. 4217; and the Application of JONES, WILSON and ERVIN, d/b/a "The Club," for Beverage Dispensary License.

On Appeal from the District Court for the District of Alaska, Third Division.

BRIEF FOR APPELLEE.

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BRIEF FOR APPELLEE.

JURISDICTION.

The jurisdictional statement regarding the jurisdition of the District Court as set forth by appellants is correct.

However, under Section 35-4-13, Alaska Compiled Laws Annotated, 1949, as amended by Chapter 131, Session Laws of Alaska, 1953, the decision of the District Court on hearings on applications for liquor licenses is made final and no appeal is permitted. By Section 292, 48 United States Code Annotated, 48 Stat. 583, it is provided in part as follows:

> "No spirituous or intoxicating liquors shall be manufactured or sold in the Territory of Alaska,

except under such regulations and restrictions as the Territorial Legislature shall prescribe, and the legislative power and authority conferred upon the Legislative Assembly of the Territory of Alaska by sections 21-24, 44, 45, 67-73, 79-90, and 145 of this title, shall be, and is, extended to include any legislation pertaining to the manufacture or sale of spirituous or intoxicating liquor within the said Territory, and any provision contained in the said sections, in conflict herewith, is expressly repealed: . . ."

Therefore, appellee moves to dismiss this appeal for the reason that the United States Court of Appeals for the Ninth Circuit does not have jurisdiction in this matter.

STATEMENT OF THE CASE.

The statement of the case as set forth by appellants is substantially correct.

STATEMENT OF POINTS RELIED ON.

I.

The trial Court did not err in finding the necessity for interpreting nor in its ultimate interpretation of the territorial statutes providing for renewal of existing liquor licenses.

II.

The Court did not err in holding that the mistaken advice given by an employee of the office of the Clerk

of the Court did not preclude the Court from asserting a correct position based on the law.

ARGUMENT.

I.

THE TRIAL COURT DID NOT ERR IN FINDING THE NECESSITY FOR INTERPRETING NOR IN ITS ULTIMATE INTERPRETATION OF THE TERRITORIAL STATUTES PROVIDING FOR RENEWAL OF EXISTING LIQUOR LICENSES.

Section 35-4-13 Alaska Compiled Laws Annotated, 1949, as amended by Chapter 131 Sessions Laws of Alaska, 1953, permits the renewal of existing liquor licenses without requiring the applicant for renewal to secure the written consent of a specified number of citizens within a certain area of the applicant's place of business, as is required of persons applying for liquor licenses for the first time. Section 35-4-15 Alaska Compiled Laws Annotated, as amended by Chapter 82, Session Laws of Alaska, 1949, and by Chapter 116, Session Laws of Alaska, 1953, permits those already having liquor licenses for premises within an otherwise proscribed area of schools and churches to continue in business in such areas. Prior to 1953, no limitation was placed on the issuance of licenses near schools or churches outside incorporated towns, so that the amendment affected by Chapter 116, Session Laws of Alaska, 1953, represents a legislative policy of restricting sales of intoxicating liquor in these areas.

In no instance do the statutes pertaining to intoxicating liquor specify a date upon which existing li-

censes must be renewed, and the District Court, in this case and that of *United States of America v. Tony Bordenelli and Eyvohn Bordenelli,* LBW 4004, held that, in order for the applicants to avail themselves of these "grandfather clause" provisos, the renewal application must be filed before the expiration of the existing license. Had the legislature specified a date upon which renewal applications must be made, there would have been no statutory ambiguity and no occasion for the trial Court to construe the statutes in this respect. Since this was not the case, however, the trial court properly felt and performed the duty of discovering the legislative intent on this matter.

In doing this, the trial Court correctly sought to ascertain the intention of the legislature in enacting the legislation in question. As stated in *In re National Guard,* 71 Vt. 493, 45 At. 1051, at page 1053:

> "A statute is to be construed with reference to its manifest object . . ."

The Court considered the problem with regard to the social problem which the legislature necessarily addressed itself, to the evils which existed and which the legislature endeavored to correct.

It is patent that liquor legislation generally is aimed at controlling the evils inherent in the liquor traffic. The following statement found in 48 CJS, Intoxicating Liquors, Section 99 at page 223, compactly summarizes the manner in which licenses to engage in such traffic is regarded:

> "A liquor license is a temporary permit or privilege, issued in the exercise of the police power of

> a state, to engage in a specified liquor business which would otherwise be unlawful. It is a matter of privilege rather than of right, personal to the licensee, and is neither a right of property nor a contract or contract right in the legal or constitutional sense of those terms."

Nor does the right of renewal of a liquor license stand on any higher plane. Like the privilege of obtaining an original license, the privilege of renewal is subject to the police power of the state. See *Cook v. Glazer's Wholesale Drug Co.,* 189 S.W. 2d 897, 209 Ark. 189.

In *Paron v. City of Shakopee,* 226 Minn. 222, 32 N.W. 2d 603 at page 608, the Court asserts:

> "No person can acquire a vested right to continue, once licensed, in a business, trade, or occupation which is subject to legislative control and regulation under the police power."

Since it must be conceded that the object of liquor control legislation generally is to promote and protect the public welfare, and since statutes are to be interpreted to effectuate the legislative objective, liquor laws are said to be remedial and therefore liberally interpreted to obtain this purpose. See Sutherland's Statutory Construction, Vol. 3, Section 7203, page 403. There the writer comments:

> "Liquor control legislation, while incidentally intended in some cases to produce revenue, has as its primary aim the protection of public welfare by preserving health and eliminating intemperance and the undesirable social and moral effects commonly existing at the saloon. Al-

> though a definite and unanimous jurisdictional policy has not yet been adopted by the courts in the interpretation of liquor laws, the prevailing and seemingly better tendency has been to give them a liberal interpretation to effectuate their purpose which is the avoidance of intemperance."

A good example of this interpretative approach is found in the case of *Dougherty v. Kentucky Alcoholic Control Board,* 279 Ky. 262, 130 S.W. 2d 756, in which a statute forbidding the issuance of a license to a liquor establishment located within a said distance from, and on the "same street or avenue" as a church, was held to be applicable to a liquor establishment on the same highway in the country.

On this point, see also Sutherland's Statutory Construction, Vol. 3, Section 7203 at pages 404 and 405, where it is stated:

> "Legislation designating the requirements for licenses to manufacture and sell liquor have generally been applied with strictness to insure absolute compliance with the law."

Where a statute is promotive of the public welfare, then, a liberal construction is applied to the general statute to effectuate its purposes, and a strict or narrow construction is applied to statutory specifications to the general statute.

The particular liquor legislation which is here in question prohibits the issuance of liquor licenses within one-quarter mile of church or school outside an incorporated town. By the very act of legislating on this subject, it must be clear that the legislature rec-

ognized an evil to combat. And, as stated by Judge Dimond in *Application of Wakefield,* 10 Alaska 599 at page 607, in discussing similar legislation applicable to incorporated towns:

> ". . . as we must assume, the purpose of our own statute was to protect minor children."

It is well established that, in the exercise of its police power, the legislature may deny the right to carry on liquor business in certain areas altogether. See:

Bowling Green v. McMullen, 134 Ky. 742, 122 S.W. 823;

State ex rel. Saperstein v. Bass, 177 Tenn. 609, 152 S.W. 2d 236;

State ex rel. Dixie Inn Inc. v. Miami, 156 Fla. 784, 24 S. 2d 705.

Moreover, it appears that those statutes prohibiting dealing in intoxicating liquor within specified distances of churches and certain public institutions which contain "grandfather" clauses have been liberally construed in favor of the churches and public institutions and strictly against the persons who wish to continue to do business within a specified area. In *Calvary Presbyterian Church v. State Liquor Authority,* 245 App. Div. 176, 281 N.Y.S. 81, page 85, the Court comments:

> "Because of the many evils attendant upon traffic in liquor, it is subject to regulation by the state in the exercise of its police power. It is fundamental that regulations by way of exceptions in respect to churches and schools must be liberally construed in their favor, and strictly against ap-

plicants for licenses to sell liquor, wine and beer, within prescribed distances."

In *State ex rel. Brown v. McCanless,* 184 Tenn. 83, 195 S.W. 2d 619 at page 621, it is said:

"This court, like many other courts, has often had occasion to call attention to the commonly known fact that the business of dealing in intoxicating liquor is subject to the most stringent regulations as to places where it is conducted if this traffic is to be at all kept in hand."

For other authority strictly construing such legislation against renewal applicants and in favor of the parties and interests sought to be protected, see also:

Appeal of Di Rocco, 167 Pa. Super. 381, 74 At. 2d 501;

People ex rel. Cairns v. Murray, 148 N.Y. 171, 42 N.E. 584;

People ex rel. Gentilesco v. Excise Board, 7 Misc. 415, 27 N.Y.S. 983;

Wright v. Board of Excise, 75 NJL 28, 66 At. 1061;

In re Place, 27 App. Div., 561, 50 N.Y.S. 640;

In re Lewis, 26 Misc. 532, 57 N.Y.S. 676;

Re Lyman, 35 App. Div. 389, 54 N.Y.S. 294;

People ex rel. Bagley v. Hamilton, 25 App. Div. 428, 49 N.Y.S. 605.

It is submitted that the trial Court in seeking the intention of the legislature in enacting the statutes herein concerned, necessarily considered the question with reference to the problem of liquor regulation in

Alaska generally and in church and school localities particularly. The societal matrix was the basis of reference. After such consideration, the Court determined that to enjoy the privilege of renewal, a continuity in the existence of a valid license was requisite. Though this was, perhaps, a strict construction of the statutes, in the light of the foregoing authorities cited, it is a proper and reasonable one.

That the Court's interpretation of the word "renewal" is not a strained one is supported by the case of *Carter v. Brooklyn Life Insurance Company,* 17 N.E. 396, page 399, 110 N.Y. 15, page 22, in which the Court holds that:

> ". . . to renew a note, a lease or a contract, it is not essential to wait until they have respectively expired; for, after that time, it would be practically impossible to renew them. A new note or lease may be made, or contract created, but they would have force and effect from the new creation, and not from the original agreement. To renew in its popular sense is to refresh, revive, or rehabilitate an expiring or declining subject; but it is not appropriate to describe the making of a new contract, or the creation of a new existence, . . ."

II.

THE COURT DID NOT ERR IN HOLDING THAT THE MISTAKEN ADVICE GIVEN BY AN EMPLOYEE OF THE OFFICE OF THE CLERK OF THE COURT DID NOT PRECLUDE THE COURT FROM ASSERTING A CORRECT POSITION BASED ON THE LAW.

The duties and powers of the Clerk of the Court relating to liquor license are specifically set forth in the statutes. See Sections 35-4-12, 35-4-13 and 35-4-14 Alaska Compiled Laws Annotated, 1949, as amended. It is clear that insofar as the Clerk of the Court is concerned his powers are of a limited nature and certainly do not suggest that he is empowered to interpret the liquor laws. Appellants, in dealing with the public employee, were charged with constructive notice of the law regarding his authority and bound to ascertain the scope of such authority.

Bennett v. Gray's Harbor County, 130 Pac. 2d 1041, 15 Wash. 2d 331;

City of Molalla v. Coover, et al., 235 Pac. 2d 142, 192 Ore. 233;

Patten v. State Personnel Board, 234 Pac. 2d 987, 106 C.A. 2d 168;

Gontrum et al. v. Mayor & City Council of Baltimore, 35 At. 2d 128, 182 Md. 370.

Apparent authority is insufficient to raise an estoppel in such cases. *State v. Davisson, et al.,* 280 S.W. 292.

The following cases illustrate that the public is not bound by the mistaken advice or opinions of public officers or employees:

Fleming, Administrator of Wage and Hour Division, U. S. Dept. of Labor v. Miller, et al., 47 Fed. Supp. 1004, in which it was held that the administrator of the Wage and Hour Division was not "estopped" from bringing action to restrain violations of the Fair Labor Standards Act because the administrator's employee had informed defendants that their practices were not violative of the act.

Commissioner of Internal Revenue v. Duckwitz, 68 F. 2d 629, in which the Government was held not estopped to claim deficiency in income taxes because of a careless expression of opinion of an employee of the Bureau of Internal Revenue.

Corning v. Town of Ontario, 121 N.Y.S. 2d 288, 204 Misc. 38, a suit to restrain defendants from enforcing a zoning ordinance as applied to a house trailer. Before acquiring and moving a house trailer, the Town Clerk and Building Inspector advised plaintiffs that there were no restrictions on such use, when in fact the zoning ordinance prohibited it. It was held that the representation and advice in which plaintiffs relied did not bind the town so as to prevent it from enforcing the ordinance.

State v. Northwest Magnesite Co., 182 Pac. 2d 643, 28 Wash. 2d 1, an action to recover additional royalties from the sale of minerals from public land leased to the plaintiff. It was held that an erroneous statement by the Commissioner of Public Lands, that the statute did not cover the lease in question, did not

preclude the state from asserting the true effect of the statutes. See also:

Thirst Quenchers of Ohio Inc. v. Glander, 68 N.E. 2d 671;

New Colonia Ice Company v. Woolley, 41 N.Y.S. 2d 662, 181 Misc. 473,

on this point.

CONCLUSION.

None of the matters complained of by appellants constitute error. The trial Court properly interpreted and applied the statutes in question, and the trial Court's decision should, therefore, be affirmed.

Dated, Anchorage, Alaska,
April 26, 1955.

Respectfully submitted,

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